Securities Commission v Omega Holdings Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–21–51 OF 2004
ABDUL WAHAB PATAIL J
11 OCTOBER 2005

Companies and Corporations — Shares — Issue of shares — Court declaring void ab initio the contract relating to the sale or offer for sale or subscription of shares — Not enough funds to pay every new investor — Whether maxim 'equality is equity' applicable

Under a scheme of arrangement ('the Scheme') submitted by the first defendant, Omega Holdings Bhd ('Omega'), Energro Bhd ('Energro') was to be listed on 20 May 2004. Approval of the plaintiff, the Suruhanjaya Sekuriti ('the Commission') and Bursa Malaysia Bhd ('Bursa Malaysia') were both obtained. The approval for the scheme was subsequently withdrawn by the Commission upon the grounds that the approval was obtained upon a material misrepresentation. After the approval for the scheme was withdrawn, the Commission applied for orders with regard to the shares that had been allocated and issued under the scheme. On 28 April 2005, the Commission obtained an order from this court declaring void ab initio the contract relating to the sale or offer for sale or subscription of Energro shares (the issue of shares). The issue before the court was about the effects and consequences of the Commission's withdrawal of approval of the scheme and the order obtained declaring the contract and issue of shares as void ab initio upon those who had subscribed for or accepted the shares of Energro issued under the scheme ("new Energro shares"). The investors interested to claim from available funds, primarily the sum held in trust with AmTrustee, fall therefore into three categories; (i) Milan Private Investors, (ii) Bumiputra subscribers; and (iii) Omega creditors. There was not enough funds to pay every new investor under the scheme for the shares that they had subscribed to. The Commission relied upon the maxim in equity that 'equality is equity'.

Held:

(1) The pro rata distribution amongst the three categories of investors under the scheme do not necessarily result in an equitable distribution since the Milan Auto Investors do not appear to have paid RM1 per share, while the Omega creditors were issued 25m shares for Omega debts exceeding RM100m. Distribution on the basis suggested would appear therefore to be pre mature and inequitable. An overly simplistic application of the maxim in equity that equality is equity was erroneous when no account is taken of material differences. It is more correct to say that 'all things being equal, equality is equity'. The rights of the three categories of claimants must be separately examined. Such examination would be much assisted by a clear appreciation of the declaration 'void ab initio' (see para 9).

(2) The declaration was not only that the issue of shares pursuant to the scheme was void but was void ab initio. In the light that s 100(1)(hh) of the Securities Industry Act 1983 that the order declared was void, void ab initio, or at all times on or after a specified date before the order was made, the qualification 'ab initio' was specific and cannot be ignored. The restoration as a consequence of that qualification to the term' 'void' must necessarily mean that the shares had never been validly issued from the beginning. Any party who received an advantage under any share allocation and issue under the scheme was bound, if required, to restore it to the person from whom he received it. Every such person was entitled to be restored in full. In practice, however, an entitlement in law to be restored in full to pre-scheme position do not always mean that the party so entitled will actually receive in full when confronted by the harsh but immutable reality of lack of funds on the part of the party obliged to restore it. In such an event, assuming all things being equal, all parties would receive on a pro rata basis. The three categories must be examined separately (see paras 11 & 14).

[Bahasa Malaysia summary

Di bawah satu skima pengurusan ('skima tersebut') yang di serah oleh defendan pertama Omega Holdings Berhad ('Omega'), Energro Berhad ('Energro') sepatutnya disenaraikan pada 20 Mei 2004. Kebenaran plaintif, Suruhanjaya Sekuriti ('Suruhanjaya tersebut') dan Bursa Malaysia Berhad ('Bursa Malaysia') telahpun diperolehi. Kebenaran skima tersebut kemudiannya telah ditarik balik oleh Suruhanjaya tersebut atas alasan-alasan bahawa kebenaran yang diperolehi adalah atas salah nyata material. Selepas kebenaran skima tersebut ditarik balik, Suruhanjaya tersebut memohon untuk perintah-perintah berhubungan dengan saham-saham yang telah diperuntukkan dan dikeluarkan di bawah skima tersebut. Pada 28 April 2005, suruhanjaya tersebut memperolehi satu perintah daripada mahkamah ini mengisytiharkan terbatal 'ab initio' kontrak berhubungan dengan penjualan atau tawaran untuk menjual atau pelangganan saham-saham Energro (isu berhubungan dengan saham-saham). Isu sebelum mahkamah ini ialah kesan-kesan dan akibat-akibat penarikan kebenaran skima tersebut oleh suruhanjaya tersebut dan perintah yang diperolehi mengisytiharkan kontrak dan pengeluaran saham-saham sebagai terbatal 'ab initio' ke atas mereka yang telah melanggan atau menerima saham-saham yang Energro telah keluarkan di bawah skima tersebut ('saham-saham baru Energro'). Pelabur-pelabur yang berminat menuntut daripada wang yang sedia ada terutama daripada jumlah yang dipegang di bawah amanah oleh AmTrustee jatuh kepada tiga kategori: (i) Pelabur-pelabur peribadi Milan, (ii) Pelanggan-pelanggan Bumiputra; dan (iii) Pemiutang-pemiutang Omega. Tidak terdapat wang yang mencukupi untuk membayar setiap pelabur-pelabur baru di bawah skima tersebut untuk saham-saham yang mereka melanggani. Suruhanjaya bergantung atas maxim ekuiti bahawa 'kesamarataan merupakan ekuiti'.

Diputuskan:

(1) Pembahagian secara pro rata di antara ketiga-tiga kategori pelabur-pelabur di bawah Skima tersebut tidak semestinya menyebabkan satu pembahagian

yang berekuiti oleh kerana Pelabur-pelabur Milan Auto tidak nampak seperti mereka telah membayar RM1 sesaham, manakala 25 juta saham-saham untuk hutang Omega yang melebihi RM100j dikeluarkan kepada Pemiutang-pemiutang Omega. Pembahagian atas dasar seperti yang dicadangkan nampaknya adalah pra masa dan tidak mengikut ekuiti. Satu pemakaian yang terlalu mudah terhadap maxim kesamarataan merupakan ekuiti adalah salah dengan tidak mengambil kira perbezaan-perbezaan yang material. Ia adalah lebih tepat untuk menyatakan bahawa 'kesemua benda-benda sekiranya adalah sama rata, kesamarataan merupakan ekuiti'. Hak-hak ketiga-tiga kategori pemohon-pemohon mestilah diteliti secara berasingan. Penelitian sebegini dapat dibantu dengan memberi maksud kepada perisytiharaan terbatal ab initio (lihat perenggan 9).

(2) Perisytiharaan tersebut bukan setakat pengeluaran saham-saham di bawah skima tersebut adalah terbatal, tetapi terbatal ab initio. Dalam merujuk kepada s 100(1)(hh) Akta Perindustrian Sekuriti 1983 bahawa perintah tersebut boleh diisytiharkan sebagai terbatal, terbatal ab initio, atau pada kesemua masa pada atau selepas satu tarikh spesifik sebelum perintah tersebut dibuat, syarat ab initio adalah spesifik dan tidak boleh tidak dipedulikan. Pengembalian yang disebabkan oleh syarat kepada terma 'terbatal' mesti bermaksud bahawa saham-saham tidak pernah dikeluarkan secara sah semenjak mulanya ia dikeluarkan. Sebarang pihak yang menerima suatu kelebihan di bawah sebarang pemberian dan pengeluaran saham di bawah skima tersebut adalah diikat, jika perlu untuk mengembalikan kepada orang yang memberinya. Setiap orang berhak untuk dikembalikan sepenuhnya. Akan tetapi, dalam amalan, hak di bawah undang-undang untuk dikembalikan sepenuhnya kepada pendirian pra-skima tidak selalunya bermaksud bahawa pihak yang berhak akan menerima sepenuhnya apabila dihadapkan dengan realiti yang keras tetapi yang tidak dapat diubah dimana kewangan tidak mencukupi dipihak yang diwajibkan mengembalikannya. Dalam keadaan begini, jika dianggap kesemua perkara adalah sama rata, kesemua pihak-pihak akan menerima atas dasar pro rata. Ketiga-tiga kategori mesti diteliti berasingan (lihat perenggan 11 & 14).]

Notes

For cases on issue of shares, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 737–741.

Legislation referred to

Contracts Act 1950 s 66
Securities Industry Act 1983 s 100(1)(hh)

RR Sethu (Seow Siew Mei & Puan Mazita Mokty from Securities Commission with him) (RR Sethu & Co) for the plaintiff.

Fiona Bodipalar (SH Tan with her) (Bodipalar Ponnudurai Nathan) for the first defendant.

Mohd Rizal Bahari (Bahari & Bahari) for the second defendant.

Bernard Francis (Shamiah KE Ng & Siva) for the third defendant.

D Paramalingam (Krish Maniam & Co) for the fourth defendant.

Abdul Wahab Patail J:

[1] Under a scheme of arrangement ('the Scheme') submitted by the first defendant, Omega Holdings Bhd ('Omega'), Energro Bhd ('Energro') was to be listed on 20 May 2004. Approval of the plaintiff, the Suruhanjaya Sekuriti ('the Commission') was obtained on 28 August 2003. Approval of the scheme pursuant to s 176(3) of the Companies Act 1965 was obtained on 16 March 2004. Approval of Bursa Malaysia Bhd ('Bursa Malaysia') was obtained on 25 March 2004. The approval for the scheme was subsequently withdrawn by the Commission upon the grounds that the approval was obtained upon a material misrepresentation that the second defendant Milan Auto (M) Sdn Bhd ('Milan Auto) was the holder of a certain motorcar agency concession in Malaysia. After the approval for the scheme was withdrawn, the Commission applied for orders with regard to the shares that had been allocated and issued under the scheme. On 28 April 2005, the Commission obtained an order from this court declaring void ab initio the contract relating to the sale or offer for sale or subscription of Energro shares ('the issue of shares').

[2] The issue now before the court is about the effects and consequences of the Commission's withdrawal of approval of the scheme and the order obtained declaring the contract and issue of shares as void ab initio upon those who had subscribed for or accepted the shares of Energro issued under the scheme ('new Energro shares').

[3] The salient features of the scheme in this case involves amongst others:

(i) The acquisition of Omega by Energro involving the issue of 2,989,493 new Energro shares to Omega shareholders in exchange for 298,949,331 Omega shares held by them;

(ii) The transfer of the listed status of Omega to Energro;

(iii) The transfer of Milan Auto retail business to Milan Auto Corporation (M) Sdn Bhd ('MAC'), a subsidiary of Milan Auto;

(iv) The acquisition of 100% equity of MAC by Energro from Milan Auto for RM120,000,000 satisfied by issuance of 120,000,000 new Energro shares;

(v) The sale of new 47,500,000 Energro shares by Milan Auto by private placement to investors ('Milan Private Investors'), gross proceeds to accrue to Milan Auto and not Energro;

(vi) The issue of 30,000,000 new Energro shares to be issued to bumiputra subscribers ('Bumiputra subscribers');

(vii) A compromise scheme of arrangement between Omega and its creditors ('Omega creditors') for issue to Omega creditors of 25,000,000 new Energro shares by, and purchase of the same shares by existing Omega shareholders.

[4] The scheme was an attempt by Omega to utilise a public issue of new Energro shares; (a) to return some value to shareholders of Omega and (b) to pay off Omega creditors by (i) transferring its public listing status to Energro, (ii) acquiring by

payment with new Energro shares of a new core business and (iii) attracting fresh cash capital by issue of further new Energro shares. A

[5] Upon receipt of the approvals, the scheme was put into effect. When the approval was subsequently withdrawn, Milan Private Investors had paid to Milan Auto for and received from Energro, new Energro shares allocated to Milan Auto as payment for MAC. Secondly, a group comprising 14 Bumiputra subscribers had been invited to subscribe to the shares of Energro under the scheme. They had collectively paid RM30m for their subscription to Affin Merchant Bank ('Affin') as placement agent for Energro. That sum is now and by agreement held in an account with AmTrustee Berhad ('AmTrustee'). Thirdly, the Omega creditors had accepted the shares of Energro as payment in lieu of the debts owed to them by Omega. B C

[6] The investors interested to claim from available funds, primarily the sum held in trust with AmTrustee fall therefore into three categories; (i) Milan Private Investors, (ii) Bumiputra subscribers; and (iii) Omega creditors. They are also referred to collectively as new investors. D

[7] There is not enough funds to pay every new investor under the scheme for the shares that they had subscribed to. Hence, the present application before this court. The proceedings are not contentious, the emphasis being to give fair and just restoration in accordance with law. With that objective in mind, financiers of the Bumiputra subscribers were also allowed to be heard for whatever assistance they may be able to give. E

[8] The Commission submitted that the right and proper order would be to distribute the sum available now held with AmTrustee proportionately to all new investors interested to claim ('the claimants') subject to adjustments for any repayments allegedly made by the second defendant to some of the claimants. This is based upon the premise that firstly, the shares had been allocated and therefore the sums paid for shares have become part of the assets of Energro from which all new investors would share. Secondly, they rely upon the maxim in equity that 'Equality is equity'. F G

[9] Assuming that the subscription for the shares have become the capital of Energro, any distribution of available funds may only be made after all the claims of all creditors have been taken into consideration. In that case, no order for any payment should be made at this stage to the claimants. Furthermore, distribution pro rata amongst the three categories of investors under the scheme do not necessarily result in an equitable distribution since the Milan Auto Investors do not appear to have paid RM1 per share, while the Omega creditors were issued 25 million shares for Omega debts exceeding RM100m. Distribution on the basis suggested would appear therefore to be pre mature and inequitable. An overly simplistic application of the maxim in equity that equality is equity is erroneous when no account is taken of material differences. It is more correct to say that 'all things being equal, equality is equity'. The rights of the three categories of claimants must be separately examined. Such examination would be much assisted by a clear appreciation of the declaration 'void ab initio'. H I

[10] The declaration that the contract and issue of shares were void ab initio and the assumption that the payments for shares subscribed for have become the capital of Energro warrant further examination. Section 100(1)(hh)of the Securities Industry Act 1983 provides:

> (hh): an order declaring the whole or any part of a contract relating to securities, including a contract for the acquisition or disposal of securities, to be void, and if the High Court thinks fit, to have been void ab initio or at all times on or after a specified date before the order is made;

[11] It is clear that when the Commission obtained an order declaring void ab initio, it was after it had withdrawn its approval for the scheme, after the issue under the scheme of new Energro shares to investors and after the investors had parted with their money or traded their rights as creditors for the new Energro shares. The declaration was not only that the issue of shares pursuant to the scheme was void, but was void ab initio. In the light that s 100(1)(hh) that the order may declare void, void ab initio, or at all times on or after a specified date before the order is made, the qualification 'ab initio' is specific and cannot be ignored. The restoration as a consequence of that qualification to the term 'void' must necessarily mean that the shares had never been validly issued from the beginning.

[12] The general principle of restoration applicable when a contract or agreement is declared void is provided in s 66 of the Contracts Act 1950 ('the Contracts Act'):

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[13] Thus, whether a contract becomes void or an agreement is discovered to be void, the consequence is the same, the party who received any advantage is bound by law to restore it to the person from whom he received it. Each party is entitled to the restoration of any advantage that the other had received from him. In plain terms, it means the parties are restored to their original position. There is no reason that this principle of restoration, in the absence of other specific provision to the contrary should not apply when an order is made under s 100(l)(hh) of the Securities Industry Act 1983. Indeed, it is essential in the securities industry to give confidence to incoming investors that in law they would be restored to their original position if they have been misled by a company to make their investment.

[14] In this case, it must be observed that the centerpiece of the investment into Energro is the scheme and that by the withdrawal of approval, the scheme has ceased to exist and consequently a declaration was made pursuant to s 100(1)(hh) that the allocation and issue of shares subscribed for pursuant to it was void ab initio. Therefore, any party who received an advantage under any share allocation and issue under the scheme is bound, if required, to restore it to the person from whom he received it. Every such person is entitled to be restored in full. In practice, however, an entitlement in law to be restored in full to pre-scheme position does not always mean that the party so entitled will actually receive in full when confronted by the

harsh but immutable reality of a lack of funds on the part of the party obliged to restore it. In such an event, assuming all things being equal, all parties would receive a pro rata basis.

[15] Next we return to examine what is it the claimants must be restored with and to. The three categories must be examined separately, and always bearing in mind that it was as a consequence of a misrepresentation in the scheme put forward by Omega that the Commission had withdrawn its approval to the scheme and obtained a declaration that the allocation and issue of shares pursuant to the scheme is void ab initio.

THE MILAN PRIVATE INVESTORS

[16] The new Energro shares bought by the Milan private investors under the scheme originated from the transfer of Milan Auto retail business to MAC, a subsidiary of Milan Auto, the acquisition of 100% equity of MAC by Energro from Milan Auto for RM120,000,000 satisfied by issuance of 120,000,000 new Energro shares and the sale of 47,500,000 of these new Energro shares by Milan Auto to private investors.

[17] Although the shares on the face of it were issued by Energro under a private placement, the payment by the Milan Private Investors accrued to and are received by Milan Auto and not Energro. It is, in fact, a sale of new Energro shares belonging to Milan Auto by Milan Auto and for Milan Auto. When approval for the scheme was withdrawn and the issue of the Energro shares were declared void ab initio, the new Energro shares failed totally as consideration. But there is no privity between the Milan Private Investors and Energro as the Milan Private Investors are not subscribers of new Energro shares from Energro but are purchasers of new Energro shares from Milan Auto. By making payment to Milan Auto for the Energro shares, they had given an advantage to Milan Auto. They are entitled to restoration when the new Energro shares were declared void. But only Milan Auto is bound to restore.

[18] A substantial number of Milan Auto have entered into settlement agreements with Milan Auto. A total of RM1,520,000 have been paid out. An order had been made to recover the RM10.585m from the fourth defendant. The details of this part of restoration must be the subject of other and further applications as and when necessary.

BUMIPUTRA SUBSCRIBERS

[19] This group, supported by their financiers submit that the total of RM30m ('the monies') they paid to Affin to subscribe to new Energro shares and now held in trust with AmTrustee Bhd must be refunded to them in full in their respective proportions together with interest, alternatively to their respective financiers and further or alternatively to Messrs Chellam Wong as stakeholders for orderly refund subject to directions of the court. Their claim is based upon the fact the monies were clearly identifiable as their payment for their subscription to the new Energro shares. That amount was paid to Affin as the agent of Energro. Under the terms of a trust

deed of 10 June 2004 (encl 35 exh K-3), the same monies were transferred from Affin to AmTrustee and placed in AmBank Bhd account No 001-201-102626-5 under the account name 'AmTB' for Energo Bhd.

[20] They rely on cl 3.2 of their subscription agreement also that in the event the shares are not listed on Bursa Malaysia, the monies were to be refunded. In my view the cl 3.2 is irrelevant in this case and therefore superfluous, as it applies to an event that could arise only if the scheme remained in force but for some other reason Energro is not listed. The agreement never envisaged the circumstances that the allocation and issue of new Energro could become effectively void.

[21] They also rely on the trust deed of 10 June 2004 (trust deed) as showing an acknowledgement by the Commission of their right to the whole sum. Upon consideration, it is my finding that the trust deed was neither intended nor could it have the effect of being more than acknowledging the fact that the monies were monies paid by the Bumiputra subscribers and received by Affin as agent of Energro. The trust deed served only to preserve the identity and nature of the monies as received from the Bumiputra subscribers.

[22] The monies received by Affin as the placement agent of Energro is received by Affin for Energro. However, although the monies received by Affin are in law monies received by Energro, they were received as payment for new Energro shares which have been declared void ab initio under the Securities Industry Act 1983. In other words, the funds could never have become capital of Energro. It would be wrong to consider the payment in those circumstances as payment into the general funds of Energro as it would place new investors to the new Energro shares as a general creditor under the Companies Act 1965, and deprive them of the protection and confidence intended to be given to investors under the Securities Industry Act 1983 to promote investment in the securities industry. There being no doubt that the Bumiputra subscribers, like any other subscribers for the new Energro shares which have been declared void ab initio is entitled to have restored to them any advantage received from them by Energro they are entitled to have restored to them forthwith all that they had paid together with interest accrued thereon for their subscription in full.

THE OMEGA CREDITORS

[23] The third group are creditors of Omega who under the scheme accepted new Energro shares in lieu of debts owed by Omega. They were issued with 25million new Energro shares which were then offered for sale to existing shareholders of Omega. A put and call arrangement was entered into between Milan Auto and creditors of Omega so that creditors of Omega could still cash out if the shares were not fully taken up by the shareholders of Omega. It was specifically provided that proceeds from the sale of these shares would accrue entirely to the Omega creditors and Energro will receive no part of the proceeds. In more direct terms, Energro bought over the debts amounting to RM102,241,331 of Omega and settled the same by issue of its own shares to the creditors who receive their payment by selling to Omega shareholders the shares that they received under the scheme.

[24] However, when the approval for the scheme was withdrawn and the contract relating to new Energro shares was declared void ab initio, the scheme and the contract relating to the sale or offer for sale or subscription of the new Energro shares that were issued hereunder, ceased to exist. The consideration for forgoing the debt of RM102,241,331 failed totally. Indeed, the acquisition of Omega by Energro by issue of Energro shares also failed. The Omega creditors are entitled to be restored to the position before they were issued with the new Energro shares which have become void ab initio. However, that claim is against Omega and not Energro.

[25] Part of these shares were disposed off and RM1,439,000 was in AmTrustee Bhd account No 514-011-58959-9 as in Sch 1 of High Court order dated 28 April 2005. These sums properly are assets of Omega shareholders.

CONCLUSION

[26] The necessary consequence of the declaration that the contract relating to Energro shares issued under the scheme, for which, approval was withdrawn by the Commission, were void ab initio was to return the Milan Auto Investors and the Omega creditors as to their original position with Milan Auto as purchasers of a failed consideration and creditors of Omega respectively. Only the Bumiputra subscribers are entitled to the sum held in AmTrustee account No 001-201-102626-5 under the name AmTB for Energo Bhd.

Order void ab initio.

Reported by Sally Kee